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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DR. JAMES P. McNEIL, Petitioner,

v.

MICHAEL G. RAFTON, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December, 9, 1983

QUESTION PRESENTED

Whether a federal judge must recuse himself upon a timely motion based upon a party's declaration of bias and impartiality, pursuant to U.S.C. §§144, 455(a)(b)(1), when the party's declaration recites his counsel's declaration of an actual impropriety on the judge's part, showing, by any reasonable standard, the judge's bias in favor of a defendant party law firm which also acted as counsel of record for all but one of the other defendants.*

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*The parties to the proceeding in the District Court were as follows:

Plaintiff James P. McNeil
Defendants Michael G. Rafton, Central Banking System, Inc., and the directors thereof, and Pillsbury, Madison & Sutro.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	12
1. The Decision Below Raises Significant Issues About Judicial Neutrality, the Appearance of Impartiality, and the Independence of the Bar.....	12
2. The Court of Appeals Misapplied the Relevant Standards	26
Conclusion	39

CITATIONS

Page

CASES:

Berger v. United States,
255 U.S. 22 (1921) 12

Berger v. United States,
413 F.2d 41 (9th Cir. 1969) 22

Church of Scientology of California v.
Cooper, 495 F.Supp. 455
(C.D. Cal. 1980) 21

Davis v. Board of School Com'rs of
Mobile County, 517 F.2d 1044
(5th Cir. 1975) 29

Hodgson v. Liquor Salesmen's Union,
444 F.2d 1344 (2d Cir. 1971) 23

Los Angeles Trust Deed [etc.] v. S.E.C.,
285 F.2d 162 (9th Cir. 1961) 33

Lyons v. United States,
325 F.2d 1069 (9th Cir. 1963),
cert. den. 377 U.S. 969, 84 S.Ct.
1650, 12 L.Ed.2d 738 (1964) 22

Matter of Evans,
411 A.2d 984 (D.C.Ct.App. 1980) 37

Mims v. Shapp,
541 F.2d 415 (3d Cir. 1976) 23

Nicodemus v. Chrysler Corp.,
596 F.2d 152 (6th Cir. 1979) 37

Parrish v. Board of Com'rs of Alabama
State Bar, 524 F.2d 98
(5th Cir. 1975) 29

CITATIONS (Continued)

Page

Pfizer Inc. v. Lord,
456 F.2d 532 (8th Cir. 1972) 29

Potashnick v. Port City Const. Co.,
609 F.2d 1101 (5th Cir. 1980) 14

Price Brothers Co. v. Philadelphia
Gear Corp., 629 F.2d 444
(6th Cir. 1980) 15

Public Utilities Comm'n v. Pollak,
343 U.S. 451 (1952) 20

Roberts v. Bailar,
625 F.2d 125 (6th Cir. 1980) 36

SCA Services Inc. v. Morgan,
557 F.2d 110 (7th Cir. 1977) 15

State of California et al. v. Kleppe,
431 F.Supp. 1344 (C.D. Cal. 1977) ... 22

United States v. Azhocar,
581 F.2d 735 (9th Cir. 1978) 33

United States v. Columbia Broadcasting
System, Inc., 497 F.2d 107
(5th Cir. 1974) 14

United States v. Comforte,
624 F.2d 869 (9th Cir. 1980) 33

United States v. Grinnell Corp.,
384 U.S. 563 (1966) 31

United States v. Ritter,
540 F.2d 549 (10th Cir. 1976) 15

United States v. Sibla,
624 F.2d 864 (9th Cir. 1980) 32

CITATIONS (Continued)

Page

United States v. Townsend,
478 F.2d 1072 (3rd Cir. 1973) 30

United States v. Tropiano,
418 F.2d 1069 (2nd Cir. 1969) 22

United States v. Zarowitz,
326 F.Supp. 90 (Cal. 1971) 20

Ward v. Village of Monroeville,
409 U.S. 57 (1962) 15

Whitaker v. McLean,
73 App. D.C. 259, 118 F.2d 596
(1941) 25

MISCELLANEOUS

Code of Judicial Conduct, Canon 3C 17

Federal Practice and Procedure,
13 Wright, Miller & Cooper,
§3549 et seq 18

H.R. Rep. No. 93-1453, 92d Cong.,
2d Sess., appearing in 3 U.S.C.
Cong. & Adm. News 6351 (1974) 20

Note, Disqualification of Judges for Bias
in the Federal Courts, 79 Harv.L.Rev.
1435 (1966) 31

S.Rep. No. 93-419, 93rd Cong., 1st Sess.,
1973 p. 5 19

Thode, E., Reporter's Notes to Code of
Judicial Conduct 60-61 (1973) 19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. ____

DR. JAMES P. McNEIL, Petitioner,

v.

MICHAEL G. RAFTON, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Dr. James P. McNeil respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Corut of Appeals for the Ninth Circuit entered in this proceeding on September 6, 1983.

OPINION BELOW

The opinion of the Court of Appeals, ordered not published, though published in full in the Los Angeles Daily Journal (83 Daily Journal D.A.R. 2629), appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 6, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a federal judge must recuse himself upon a timely motion based upon a party's declaration of bias and impartiality, pursuant to U.S.C. §§144, 455(a)(b)(1), when the party's declaration recites his counsel's

declaration of an actual impropriety on the judge's part, showing, by any reasonable standard, the judge's bias in favor of a defendant party law firm which also acted as counsel of record for all but one of the other defendants.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good

cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel stating that it is made in good faith.

§455(a)(b)(1) Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances.

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding ....

STATEMENT OF THE CASE

The case below was a shareholders' derivative action (Rule 23.1, F.R.Civ.P.) within the district court's diversity jurisdiction. R.1. The plaintiff (here peti-

tioner) Dr. James P. McNeill was a founder of the Delaware corporation whose shareholders he represented, Central Banking System, Inc., and at all times one of the largest minority shareholders and a director from the inception of the company. The corporation is a bank holding company, whose Board of Directors is chaired by defendant Michael G. Rafton. In 1974 and 1975, Mr. Rafton sold three of the corporation's subsidiary banks to Russian-financed Singapore businessman Amos Dawe, and Rafton also sold Dawe his own shares in Central Banking System. As a result of these transactions, the corporation found itself in litigation with Singaporean C.K. Liew. As a result of that litigation, the corporation paid over $500,000 in settlement in 1980, and paid $400,000 in attorneys' fees. Rafton then induced the Board (also defendants below) to pay over $100,000 of his personal attorneys' fees in the C.K. Liew litigation. R.1.

Director and shareholder McNeil

believed that it was a breach of fiduciary responsibilities for Rafton and the Board to pay the Rafton fees, and for Rafton to have gotten the corporation into the expensive legal difficulties he had; director McNeil also thought Rafton guilty of other improprieties. Among these was the offer of a $120,000 bribe to the former general counsel of the corporation, Edward FitzSimmons, who was fired after the C.K. Liew litigation, and which $120,000 was offered under the aegis of the law firm of Pillsbury, Madison and Sutro, who were therefore also made defendants below. R.1.

Director McNeil filed his derivative action on October 14, 1980, naming Rafton, the other Board members who were on the Board at material times, and the law firm as defendants.

The district court, in the person of the Honorable William H. Orrick, dismissed the action when petitioner declined to post a $50,000 bond to prosecute it, R. 109, 129,

133; judgment was entered July 15, 1981. R. 131. In its first rulings in the case, on December 19, 1980, R. 106, the district court granted summary judgment to the law firm defendants, denied their motion for Rule 11 sanctions, and denied petitioner's motion that Judge Orrick recuse himself for an actual impropriety in his first in-chambers and unreported hearing in the case (which latter ruling denying the disqualification motion is the subject of this Writ).

On November 26, 1980, counsel below appeared at an unreported hearing in Judge Orrick's chambers to argue a continuance on the defendants' motion for a bond, necessitated by its having been filed while petitioner's counsel was consulting with a client in the Far East, and despite a stipulation putting off any response to the complaint until his return. R. 56, 64.

At this unreported hearing, which opened with a discussion of alumni business between the judge and a partner in the

defendant law firm, Judge Orrick threatened to disbar petitioner's counsel, and sanction petitioner over $30,000, for having named the Pillsbury firm as defendants, and after this threat, granted the requested continuance with the admonition to petitioner's counsel to use the time to dismiss the law firm as defendants. R. 56, 64.

Both petitioner and petitioner's counsel filed declarations setting forth facts and the reasons for their belief that Judge Orrick was biased and prejudiced. R. 56, 61. The pertinent paragraphs of petitioner's counsel's declaration read as follows:

10. Judge Orrick's courtroom deputy invited all counsel into chambers, where we appeared without a court reporter.

11. Mr. William Edlund, of the Pillsbury firm, after discussing some alumni affairs with the judge, and after some incidental discussion of the trial in which the Court was then engaged, argued that the complaint was a sham, an issue not before the

Court at our appearance.

12. I responded that discussion of the merits was not my purpose in appearing, but attempted to give Judge Orrick some background on the prior related C.K. Liew vs. Central Banking System cases, with which he had had nothing to do and which I litigated for four years.

13. Judge Orrick interrupted and said that this case reminded him of a case he had just decided in San Diego (although he admitted he had not yet read the file), and that in the San Diego case, which apparently also involved lawyer defendants, he had recommended the plaintiff's attorney for disbarment and sanctioned the plaintiff $33,000.

14. Judge Orrick made these statements to me as a direct threat, and recited several lines from Shakespeare on the sanctity of reputation, meaning the reputation of the defendant lawyers Pillsbury, Madison and Sutro, with whom he appeared to feel some affinity.

15. Judge Orrick then invited me, in view of the continuance of the hearing, to dismiss or amend out the lawyer defendants....

17. Because of Judge Orrick's statement to me, I do not believe my client can get a fair trial before him, and I do not believe he will get a fair hearing at any stage of the proceedings.

Petitioner incorporated his counsel's declaration into his own, which read as follows:

1. I am the plaintiff herein.

2. On the afternoon of November 26, 1980 I received a telephone call from my attorney of record herein, Bartholomew Lee, who told me what had happened in the chambers of The Honorable William H. Orrick, Jr. immediately prior to his call; I have read Mr. Lee's declaration of December 7, 1980 and that declaration recites the same events about which Mr. Lee told me and I incorporate that declaration by this reference.

3. As a result of the threat of disbarment made to my attorney, and the threat of sanctions to be imposed on me, followed by the invitation to dismiss the Pillsbury, Madison & Sutro defendants, I believe, and affirm my belief, that the interests which I represent cannot receive a fair and impartial hearing from Judge Orrick, because of his demonstrated extrajudicial bias in favor of the Pillsbury defendants and prejudice against me and my attorney.

4. I am a director of Central Banking System and I serve as a fiduciary to the shareholders of Central Banking System, and I believe my fiduciary obligations require that I instruct my attorney to move that Judge Orrick recuse himself from this case, on the grounds stated above.

Judge Orrick denied petitioner's motion for recusal without further briefing and with no argument, R. 106, while declaring from the bench his friendship with the party defendant attorneys and his refusal to adjudicate a

complaint against attorneys. R. 79, 80, 81.

The Court of Appeals affirmed Judge Orrick's denial of the motion for recusal holding that each of petitioner's allegations of bias, taken alone and not in conjunction with other allegations, did not warrant recusal.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT ISSUES ABOUT JUDICIAL NEUTRALITY, THE APPEARANCE OF IMPARTIALITY, AND THE INDEPENDENCE OF THE BAR.

The declarations of petitioner and his counsel, the allegations of which must be taken as true for purposes of testing their sufficiency on a motion to recuse, Berger v. United States, 255 U.S. 22 (1921), present a simple factual scenario:

A judge who has not read the file of the case turns from a discussion of mutual alumni matters with the attorney representing the defendant law firm (which attorney himself is a member of that law firm), hears

that attorney's claim that the complaint against the law firm is a sham, then threatens the plaintiff's counsel with disbarment and the plaintiff with monetary sanctions unless plaintiff's counsel dismisses the law firm defendant. R. 56, 61.

In holding that these allegations are not legally sufficient to mandate recusal, the Court of Appeal has put lawyers in the Ninth Circuit on notice that a judge who has a personal bias in favor of attorney defendants can, with impunity, rob counsel for plaintiff of his or her independence in structuring and pursuing a lawsuit in the manner that attorney feels best represents the client's right and interests and deny to the public of the actual and apparent judicial impartiality to which it is entitled.

There is no doubt that Ninth Circuit attorneys have received this message, for although the Court of Appeal ordered its opinion unpublished, the full text of the

opinion received wide circulation in the Circuit when it was published in the leading area legal newspaper. See McNeil v. Rafton, et al., 83 Daily Jounral D.A.R. 2629 (September 22, 1983).

The Court of Appeal's holding that the threat of disbarment was proper because "it was not improper for the judge to warn plaintiff of his approach to particular [sic] type of claim" (see Appendix hereto) completely sidesteps the issue of the independence of the bar and the goal of judicial disqualification statutes, which is to foster the appearance of impartiality. Postashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir. 1980).

> "This overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, 'the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system.' United States v. Columbia Broadcasting System, Inc., 497

> F.2d 107, 109 (5th Cir. 1974). Any question of a judge's impartiality threatens the purity of the judicial process and its institutions." 609 F.2d at 1111; footnote omitted.

See also, on the necessity of the appearance of impartiality, Price Brothers Co. v. Philadelphia Gear Corp., 629 F.2d 444 (6th Cir. 1980); SCA Services Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977); United States v. Ritter, 540 F.2d 549 (10th Cir. 1976) all requiring disqualifications of judges whose impartiality might reasonably be questioned.

Parties to litigation in the federal courts have a constitutional right to have a "neutral and detached judge" preside over judicial proceedings. Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972). Fundamental to procedural due process is the right of parties litigant to have disputes resolved by a tribunal free of personal bias or prejudice. Essential to the vitality of a system which seeks to resolve disputes not by the whim of human nature, but by the strength of law, is a conviction that those charged with

interpreting and applying the law are doing so fairly and impartially.

To ensure litigants the impartial and unbiased tribunal that due process and fundamental fairness require, Congress enacted two statutes applicable to the disqualification of federal district court judges. Section 455 of the Judicial Code provides for a judge to disqualify himself under certain defined circumstances and in certain proceedings, including "any proceeding in which his impartiality might reasonably be questioned." Section 144 of the Code provides for disqualification based upon the filing of a timely and legally sufficient affidavit of bias or prejudice by a party litigant. Disqualification was required in the present case whether the standards employed be those of Section 455 or Section 144.

Section 455(a), which is now the basic provision in the Judicial Code concerning disqualification of judges, provides as follows:

"Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (Emphasis added.)

Section 455 was amended, effective December 5, 1974, in order to eliminate certain limitations in the previous statute, which provided for a judge to disqualify himself only when "in his opinion" there were grounds for disqualification. Section 455 now generally incorporates Canon 3C of the Code of Judicial Conduct, substituting a "reasonable man" test for the "judge's opinion" test. Canon 3C, in relevant part, provides:

"(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concering the proceeding...."

The legislative history of Section 455(a) describes its objective as follows:

"Subsection (a) of the amended

section 455 contains the general, or catch-all provision that a judge shall disqualify himself in any proceeding in which 'his impartiality might reasonably be questioned.' This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase 'in his opinion.' This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute. See Edwards v. United States (5th Cir. 1964) 334 Fed. 360. Under the interpretation set forth in the Edwards case, a judge, faced with a close question of disqualification, was urged to resolve the issue in favor of a 'duty to sit.' Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system." (H.R.Rep.No. 93-1453, 92d Cong., 2d Sess., appearing in 3 U.S.C. Cong. & Adm. News 6351, 6354-55 (1974)).

As suggested by the legislative history and recognized by commentators "[t]his [subsection] makes a drastic change in practice in the federal courts." 13 Wright, Miller & Cooper, Federal Practice and Procedure §3549,

at 369 (1975). The amended statute requires that the Court examine the facts presented which suggest his bias or prejudice from an objective standpoint, rather than from a subjective point of view; it mandates disqualification where there is "a reasonable question of impartiality." (S.Rep.No. 93-419, 93d Cong., 1st Sess., 1973 p. 5). The purpose of Section 455 is to establish a procedure for disqualification where the Court's actions may have created the "appearance of impartiality." 13 Wright, Miller & Cooper, supra, at 370.

As previously noted, Section 455(a) was modeled on Canon 3C of the Code of Judicial Conduct. The reporter of the Code stated the applicable standard for Canon 3C as follows:

> "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." (Thode, Reporter's Notes to Code of Judicial Conduct, 60-61 (1973).

The legislative history of Section 455(a)

comports with this approach:

> "This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." (H.R. Rep. 93-1453, supra, at 6355).

In Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), Justice Frankfurter declined sua sponta to participate in that case based upon his concern that he could not render an impartial judgment, concluding that the appearance of an unbiased administration of justice is as important as impartiality in fact. In United States v. Zarowitz, 326 F.Supp. 90 (C.D. Cal. 1971), Judge Hauk of the Central District of California found himself free of bias and prejudice under the former version of 28 U.S.C. §455, yet recused himself on the grounds that the allegation of the bias made by two of the defendants created the appearance of impropriety. The Court stated that the affidavits,

> "...taken together do appear to be

sufficient, legally and factually and standing as they must without evidentiary contradiction, to show the appearance of possible personal bias or prejudice -- a showing which necessarily gives us pause and dictates that we disqualify and recuse ourself sua sponta." 326 F.Supp. at 92 (emphasis in original).

In stating his reasons for recusal, Judge Hauk explained:

"[A] circumspect and punctilious devotion to the ideal of justice in the abstract as it appears to the public at large, as well as the ideal of fairness as it is applied concretely in the case before us, affirms our determination to disqualify and recuse ourself. Like Caesar who parted from his wife Pompeia because she was not above suspicion [footnote omitted], so here to avoid even the appearance of the possibility of personal bias or prejudice, wise discretion and sound judgment compel us to leave this case, however reluctant we are to thrust its burden on another Judge of our Court or to cause any delay or inconvenience to the parties." (326 F.Supp. at 92).

See also Church of Scientology of California v. Cooper, 495 F.Supp. 455 (C.D. Cal. 1980) in which Judge Hauk also disqualified himself, saying in a case that also involved off-the-record remarks of the Court:

"Since they are based upon 28 U.S.C. §§144 and 455 and Code of Judicial

Conduct, Canon 3C, we are required to examine the plaintiff's Affidavits and Certificate to determine if they meet the tests required by the United States Code and said Canon, namely, those of (1) timeliness and (2) legal sufficiency. If they do, then the factual allegations contained in the Affidavit must be taken as true and the Court has no power or authority to contest in any way whatsoever the necessary acceptance of truthfulness of the facts alleged, even though the Court may be aware of facts which would indicate clearly the falsity of any such allegations. Berger v. United States, 413 F.2d 41 (9th Cir. 1969); United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969); Lyons v. United States, 325 F.2d 370 (9th Cir. 1963), cert.den. 377 U.S. 969, 84 S.Ct. 1650, 12 L.Ed.2d 738 (1964). See also United States v. Zarowitz, 326 F.Supp. 90, 91 (C.D. Cal. 1976), State of California, et al. v. Kleppe, 431 F.Supp. 1344 (C.D. Cal. 1977), [etc.]...

* * *

"Despite the problems the Court has with the factual allegations contained in plaintiff's motion, and despite the Court's firm recollection and conviction that the allegations are false, it feels compelled and bound to follow the more prudent course of granting the plaintiff's Motion for Recusal. Canon 3C(1) and 28 U.S.C. §455(a) mandate that a Judge shall disqualify himself whenever 'his impartiality might reasonably be questioned.' The Court herein finds that plaintiff's Motion for Recusal, while indeed false and erroneous in its allegations, is based upon what Ms. Yassky and the plain-

> tiff's counsel apparently feel is reasonable. Moreover, it has been said in some cases and by some authorities that recusal should be granted, pursuant to the aforementioned Canon 3C(1) of the Code of Judicial Conduct, and 28 U.S.C. §455(a), in such a situation, even when the Court is in doubt as to the 'reasonableness' of an affiant's belief. This conclusion is reached on the basis of the court's recognition of the sensitive nature of the case itself and the principles underlying the pertinent sections of the United States Code and the Code of Judicial Conduct, as well as other relevant factors governing Judicial disqualifications, having in mind that when in doubt the Court should resolve the issue in favor of the party seeking recusal. E.g. Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976); Hodgson v. Liquor Salesmen's Union, 444 F.2d 1344, 1348 (2d Cir. 1981)." (495 F.Supp. at 463).

The petitioner and his counsel, in their declarations, presented a record of specific facts which required the disqualification of the district judge from further participation in the proceedings. The ultimate decision under 28 U.S.C. §455(a) as to whether the judge's "impartiality might reasonably be questioned" must draw, as the Tenth Circuit correctly concluded in United States v. Ritter, upon "all of the facts"

presented. The facts presented here showed menace toward counsel, an officer of the Court, and actual bias in favor of a defendant before the Court, a prejudgment against petitioner's case because of its nature, and an improper invitation, coupled with the threat to counsel, to dismiss the defendant towards whom the Court had shown partiality.

Although disqualification was required under the general standard of 28 U.S.C. §455(a), petitioner also met the more specific and rigorous standards of 28 U.S.C. §144 and 455(b)(1), and accordingly filed a declaration of bias and prejudice under those sections. Not only was there an appearance of partiality on the record; that very record demonstrated the existence of actual personal bias and prejudice in favor of certain defendants and against petitioner or his counsel.

It has long been recognized that freedom of the tribunal from bias or prejudice is an essential element of due

process. E.g., Whitaker v. McLean, 73 App. D.C. 259, 118 F.2d 596 (1941). First enacted in 1911 to provide a procedure for the invocation of such rights to an impartial court, the section of the Judicial Code which is now found at 28 U.S.C. §144 provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

28 U.S.C. §455(b)(1) also mandates disqualification of a judge when he has a personal bias or prejudice:

> (b) He [any judge] shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...."

The motion below was grounded both upon 28 U.S.C. §144 and 28 U.S.C. §145(b)(1), as well as upon 28 U.S.C. §455(a).

2. THE COURT OF APPEALS MISAPPLIED THE RELEVANT STANDARDS.

In examining the allegations of bias of petitioner and his counsel the Court of Appeals used a "divide and conquer" appoach, isolating each individual allegation and testing that allegation alone to see if, under the "reasonable man" standard, it met the test of legal sufficiency. Thus in its opinion the Court of Appeals looks first at the threat of disbarment, alone, and concludes that this is not evidence of a personal bias but merely a warning to petitioner that the judge "takes a particularly aggressive approach to sham pleas charging lawyers with improprieties." See Appendix hereto.

Not only does the Court of Appeals view this allegation in isolation, it assumes that the pleading was indeed sham, thus failing to take petitioner's allegations as true, deferring instead to the judge's prejudgment that the pleading was sham, a prejudgment based on defendant law firm's argument and made before the judge had reviewed the file.

The Court of Appeals then considers, alone, the allegations regarding the judge's discussion of alumni matters with one of the law firm's lawyers and the judge's expressed concern with the law firm's reputation, and concludes that judges "should not be required to recuse themselves simply because they attended the same school as one of the attorneys before them or participated with them in alumni or professional activities." See Appendix hereto. Not only does the Court here fail to address the issue that the attorneys before the judge were also party defendants in the action, but also fails to read the allegations in context and as a

whole.

The allegations of petitioner and his counsel, read reasonably and as a whole, state that the judge's bias and prejudice are shown by all the facts: by the alumni discussions between the judge and one of the lawyers from the defendant law firm and by the threat to disbar petitioner's counsel if the defendant law firm was not amended out of the complaint and by the judge's statements showing concern with the law firm's reputation. If only one of these allegations supported petitioner's charge of bias, it may be that not enough evidence of the appearance of partiality was presented to require recusal. But all of the allegations of bias, examined together and against the applicable standards set forth below, meet the test of legal sufficiency.

The legal standards to be applied to affidavits presented under 28 U.S.C. §144 were first set out in Berger v. United States, 255 U.S. 22 (1921) where this Court

held that, in passing on the sufficiency of a party's affidavit alleging the personal bias and prejudice of the district court judge, a challenged judge must assume as the truth of the facts contained in the affidavit, and must only decide whether the alleged facts, taken as true, give "fair support to the charge." See also Parrish v. Board of Com'rs of Alabama State Bar, 524 F.2d 98, 100 (5th Cir. 1975); Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975); Pfizer Inc. v. Lord, 456 F.2d 532, 537 (8th Cir. 1972). In accordance with this established standard, each court's review of the attached declarations pursuant to section 144 must be restricted solely to the legal question of their sufficiency, without regard to any belief on the Court's part or otherwise that there may be contrary evidence.

In order to be held legally sufficient for disqualification, a party's affidavit may not rely on mere assertions or conclusions,

but must set forth facts which "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Berger v. United States, supra, at 33-34; United States v. Townsend, 478 F.2d 1072, 1073-74 (3d Cir. 1973). The declarations submitted by petitioner here fully met this requirement.

As the Court stated in Berger:

> "The belief of a party the section makes of concern and if opinion be nearer to or farther from persuasion than belief, both are of influence and universally regarded as of influence in the affairs of men and determinative of their conduct..." (Berger v. United States, supra at 34 (emphasis added)).

The affidavits or declarations must reasonably support the belief of the affiant that bias exists, but need not necessarily prove bias in fact. As one commentator has stated:

> "A formulation more in keeping with the purpose of the statute would require only that the facts alleged must justify a reasonable apprehension on the part of the affiant that the judge may be biased. This formulation shifts the emphasis from the judge's actual state of mind to the reasonableness of

> the litigant's fear, an emphasis at least supported, and possibly required, by the statutory language...." (Disqualification of Judges for Bias in the Federal Courts, 79 Harv.L.Rev. 1435, 1446 (1966) (emphasis added)).

It was established very early in the history of Section 144 that a party may rely upon information and belief derived from others in setting forth the facts upon which his affidavit of bias rests, so long as the information concerns a definite incident, and its time and place given. Berger v. United States, supra, at 34. Petitioner's declaration was also sufficient in these respects.

Both Section 144 and Section 455(b)(1) require that the bias of the Court for or against a party be a "personal" bias, that is, that it stem from an extra-judicial source. United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). It is not sufficient that litigant be dissatisfied with a court's judicial rulings however erroneous he may believe such rulings to be. The petitioner did not predicate his motion upon such

grounds; the Court had made no rulings in this matter at the time of the motion. As earlier discussed, petitioner relied upon evidence of the Court's personal bias, as shown by all of the allegations taken together. It can hardly be claimed that a suggestion that a party law firm be dismissed or the judge will recommend disbarment of the petitioner's counsel and sanction petitioner, following closely on the heels of the judge's discussion with a party law firm attorney of mutual alumni matters, does not give "fair support" to the charge of bias and to the charge that this bias was extra-judicial.

Under the general judicial disqualification statute 28 U.S.C. 455, no affidavits are required and the cases construing the statute enjoin courts to analyze all of the circumstances surrounding the allegations against the judge on the issue of bias. See United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980): "Such a [section 144] motion should also prompt the judge to whom

the motion is directed to determine independently whether all the circumstances call for recusal under the self-enforcing provisions of Section 455(a) and (b)(1)...." (emphasis added.) See also Los Angeles Trust Deed [etc.] v. S.E.C., 285 F.2d 162, 176 (9th Cir. 1961) where the court did "...a thorough reading of the record...;" United States v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978) cited Los Angeles Trust Deed and held that: "...inquiry into the circumstances surrounding the presumptively true allegations is often appropriate...." Azhocar is a Section 144 case, and in United States v. Conforte, 624 F.2d 569, 881 (9th Cir. 1980) a Section 455 case, the Court held, "the test under either subsection (a) or (b) is the same, namely, whether given all the facts of the case there are reasonable grounds for a finding that the judge could not try the case fairly, either because of the appearance or the fact of bias or prejudice" (emphasis added).

The allegations of the aggrieved party, which must be taken as true and must be considered in their own context, require recusal of even a wholly innocent judge. Congress demands even this recusal as the price to pay for public confidence in the judiciary, and on the whole, it is a fair price, and a limited price because only one such Section 144 motion can be made. Yet the reach of 28 U.S.C. §455 is broader than 28 U.S.C. §144, United States v. Conforte, 624 F.2d 869, 880, 881 (9th Cir. 1980), and under §455, all circumstances are relevant. This is the courts' own construction to the same end as the Congressional purpose, namely public confidence in the judiciary. If an artificial limit to the aggrieved party's affidavit resulted in a judge sitting who by all the circumstances no longer presented the appearance of impartiality, then indeed public confidence in the judiciary would suffer. A public that no longer believes it will get justice when it goes to law will

take the law into its own hands. The due process guarantee of an impartial judge is thus not only a guarantee to the citizenry, it is a protection to the very fabric of society itself. To protect these substantial interests the courts must preserve both the appearance and the fact of impartiality, and to do so should take into account all of the circumstances supporting an allegation of judicial impropriety.

Petitioner pleaded facts in his declaration that are unambiguous and forthright, and that a reasonable man, the public, would have to take to mean that Judge Orrick showed bias in favor of the attorneys who were defendants, and against petitioner McNeil. Moreover, as the Judge's initial in-chambers discussion of alumni business with a defendant attorney shows, the source of this bias is extra-judicial. Nothing significant had yet happened in the case to create a "judicial" source of bias, and the judge had not yet read the file. Judge Orrick's menace

to counsel to compel "voluntary" dismissal of the attorney defendants had no judicial source; it came from the mere fact that the particular firm of attorneys had been named as defendants (and Judge Orrick later said on the record that attorneys are in effect immune from suit in his court, E.R. 81).

The requirement that the bias necessary for disqualification be "extra-judicial" merely means that the bias must not arise from the rulings and proceedings in the case. What a judge does and says in a case may well, however, evidence his extra-judicial bias. See, e.g. Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980), finding recusal necessary upon the judge's remarks on the record that he knew a defendant to be honorable and that that defendant would not have acted as alleged. The facts in Roberts are less egregious than the facts in the instant case, wherein Judge Orrick (in chambers and without a record) sided with particular attorney-defendants, menaced plaintiff's

counsel and plaintiff with disbarment and sanctions for naming those attorneys as defendants, singled out the reputation of law firms as a special concern in his courtroom, and then having made his threat, invited plaintiff's counsel to dismiss the lawyer defendants; all of which took place in the initial context of a discussion of alumni business with a partner in the defendant law firm (appearing as counsel), and with the judge acknowledging that he had not yet read the file. The judge's remarks in Roberts, supra, required disqualification for far less.

See also Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979) disqualifying for on the record remarks at a hearing on the merits, and Matter of Evans, 411 A.2d 984, 995 (D.C. Ct. App. 1980), where the record made by the judge extended the incident "beyond the four corners of the courtroom," showing an extra-judicial source of bias. In the instant case, the judge's remarks on the

record on December 19, 1980, R 74, extended the matter into his relationship with attorneys in the larger San Francisco firms, his father's relationships, and his reluctance to hear any case against attorneys.

The opinion of the Court of Appeals in this case received wide circulation through its publication in the Los Angeles Daily Journal. The application of the law to the facts by the Court is manifestly incorrect. The importance of the issues involved and the errors of the Court of Appeal on review justify the grant of certiorari to review the judgment below.

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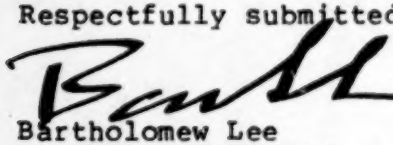
CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: December 9, 1983

Respectfully submitted,



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OPINION OF THE COURT OF APPEALS

DR. JAMES P. McNEILL, Plaintiff-Appellant,

v.

MICHAEL G. RAFTON, individually and JOHN D. CARLISLE, RICHARD F. DAVIS, GRACE H. FOSTER, ERNEST M. KING, GEORGE KOREGELOS, SPIRO D. MELLIS, JAMES K. HERBERT, as directors of CENTRAL BANKING SYSTEM, a Delaware Corporation, and PILLSBURY, MADISON & SUTRO, a partnership, Defendant-Appellees.

No. 81-4393
D.C. No. CV 80-3904
United States Court of Appeals
Ninth Circuit
Filed Sept. 6, 1983

Appeal from the United District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding
Argued January 12, 1982
Submitted April 22, 1982

Before: BROWNING, Chief Judge, SKOPIL and NORRIS, Circuit Judges

Plaintiff McNeill brought a shareholders' derivative suit naming board members of Central Banking System and the law firm of Pillsbury, Madison & Sutro as defendants. Plaintiff alleged the law firm aided the

board members in offering a bribe to Central Banking System's general counsel. The law firm defendant moved for summary judgment and for sanctions against plaintiff under Rule 11 of the Federal Rules of Civil Procedure. Based on an exchange during an in-chambers hearing on plaintiff's motion for a continuance to oppose these motions, plaintiff moved that the district judge recuse himself under 28 U.S.C. sec. 144, 455(a) and 455(b)(1). The judge denied plaintiff's motion for recusal, granted summary judgment to the law firm defendant, and denied its motion for Rule 11 sanctions. The sole issue on appeal is whether the judge properly refused to recuse himself.

In his section 144 affidavit, plaintiff's counsel describes the relevant exchange as follows:

> 11. Mr. William Edlund, of the Pillsbury firm, after discussing some alumni affairs with the judge, and after some incidental discussion of the trial in which the Court was then engaged, argued that the complaint was a sham, an issue not before the Court

at our appearance.

12. I responded that discussion of the merits was not my purpose in appearing, but attempted to give Judge Orrick some background on the prior related C.K. Liew vs. Central Banking System cases, with which he had had nothing to do and which I litigated for four years.

13. Judge Orrick interrupted and said that this case reminded him of a case he had just decided in San Diego (although he admitted he had not yet read the file), and that in the San Diego case, which apparently also involved lawyer defendants, he had recommended the plaintiff's attorney for disbarment and sanctioned the plaintiff $33,000.

14. Judge Orrick made these statements to me as a direct threat, and recited several lines from Shakespeare on the sanctity of reputation, meaning the reputation of the defendant lawyers Pillsbury, Madison and Sutro, with whom he appeared to feel some affinity.

15. Judge Orrice then invited me, in view of the continuance of the hearing, to dismiss or amend out the lawyer defendants.

16. I have been badly shaken, personally, by Judge Orrick's threat to have me disbarred; never in my practice has anything like this ever happened to me, and my ability to represent my client (who is himself suing in a fiduciary capacity) has been impaired.

17. Because of Judge Orrick's statement to me, I do not believe my client can get a fair trial before him, and I

do not believe he will get a fair hearing at any stage of the proceedings.

As additional support for the section 455 motion, plaintiff cites to the transcript of the judge's ruling refusing to recuse himself, where the judge stated:

> I should say, also for the record, that sitting before me ... Mr. Bates and I are about the same age. We took the bar exams together. And we see each other, from time to time.
>
> I think Mr. Bartko and I once had a case - I forget whether we were on the same side.
>
> Mr. Edlund I've known through the Boalt Hall Alumni Association.
>
> My father was a great friend of Mr. Sutro and Mr. Madison. As well as the great friend of Mr. Morrison, Mr. Dunne, Mr. Brobeck, all lawyers in the city.
>
> And I, too, am very pleased to have as friends lawyers in most of the firms in this city.
>
> So as far as I'm concerned, that's the end of that. The affidavit I find insufficient.

Plaintiff contends the judge's statements revealed bias in favor of defendant law firm and against plaintiff and his counsel.

Where personal bias is the only ground

asserted for disqualification, the substantive test under 28 U.S.C. sec. 144, 455(a) 455(b)(1) is the same. United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980). That test is neither the subjective feelings of the defendant, Wolfson v. Palmieri, 396 F.2d 121, 125 (2d Cir. 1968), nor the judge's knowledge of his actual state of mind, Berger v. United States, 255 U.S. 22 (1921), but "whether 'a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" Ronwin v. State Bar of Arizona, 686 F.2d 692, 700-01 (9th Cir. 1982).

Taking the allegations in plaintiff's counsel's affidavit as true, Berger v. United States, 255 U.S. 22, we conclude they are insufficient to cause a reasonable person to doubt the judge's impartiality.

Plaintiff contends the judge's discussion of a prior case in which he "recommended an attorney for disbarment and sanctioned the

plaintiff $33,000, "together with an invitation to plaintiff's counsel "to dismiss or amend out" the law firm defendant in this action, show the judge had prejudged the case against plaintiff because of its nature.

Section 144 and 455 were not meant to protect litigants from judges with particular leanings in the law, but only from personal, extrajudicial bias. See, e.g., United States v. Phillips, 664 F.2d 971, 1002-03 (5th Cir. 1981); Sibla, 624 F.2d at 869; Phillips v. Joint Legislative Committee on Performance and Expenditure Review of Mississippi, 637 F.2d 1014, 1020 (5th Cir. 1981). See also Laird v. Tatum, 409 U.S. 824, 839 (1972) (memorandum of Justice Rehnquist). A reasonable person could conclude from the judge's statements that he takes a particularly aggressive approach to sham pleas charging lawyers with improprieties, but nother indicates a personal bias against plaintiff.

Plaintiff contends the judge's remarks

were nevertheless extrajudicial because they were made at an unreported hearing. The requirement that bias be extrajudicial refers to the source of bias, not to the setting in which it is expressed. See, e.g., United States v. Phillips, 664 F.2d at 1003; In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 967 (5th Cir. 1980); United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976). Plaintiff complains the judge "threatened" him, but it was not improper for the judge to warn plaintiff of his approach to particular type of claim. Sibla, 624 F.2d at 869.

The allegations supporting plaintiff's conclusion that the judge showed bias for the defendant law firm at the in-chambers hearing are that the judge discussed alumni affairs with one of the law firm's lawyers, seemed particularly concerned with the law firm's reputation, and "appeared to feel some affinity" for its lawyers. The implied connection between the judge and the defendant

law firm based on the brief discussion of alumni affairs with one of its lawyers "is too remote and too inocuous" to allow an inference of bias. Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1166 (5th Cir. 1982). Judges, who are encouraged to participate in professional affairs (see, e.g., ABA Code of Judicial Conduct, Canon 4), should not be required to recuse themselves simply because they attended the same school as one of the attorneys before them or participated with them in alumni or professional activities. See United States v. Mitchell, 377 F.Supp. 1312, 1323 (D.D.C.) affirmed United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (prior social contacts between judge and attorney not grounds for recusal). The allegations concerning the judge's feelings about the law firm "are not statements of fact but are conclusions of the affiant" insufficient to suggest bias. Willenbring v. United States, 306 F.2d 944, 946 (9th Cir. 1962).

Finally, a reasonable person with knowledge of the surrounding circumstances would not infer personal bias from the judge's expressions of regard for the defendant law firm's lawyers in the course of his ruling on plaintiff's recusal motion. The remarks were made in the context of a lecture to both parties in which the judge expressed his high regard for lawyers generally, admonished both parties "to practice law without calling each other names," acknowledged plaintiff's counsel's good faith, and reprimanded one of the defendant law firm's lawyers for questioning plaintiff's counsel's integrity. While the judge's remarks can fairly be said to evidence a strong judicial skepticism towards claims of lawyer misconduct generally, they do not suggest an absolute prejudgment as in United States v. Townsend, 478 F.2d 1072 (3d Cir. 1973), nor the influence of a personal relationship as in Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980).

AFFIRMED.

PROOF OF SERVICE

Batholomew Lee declares under penalty of perjury on this 19th day of December, 1983 at San Francisco, CA pursuant to 28 USC 1746 that he is counsel of record for the Petitioner herein, Dr. James P. McNeill, and that he today served by first class mail three copies of the within (revised) Petition on counsel for the respondants:

Pillsbury, Madison & Sutro
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